In The

Supreme Court of the United States

October Term, 1977

No. 77-47

GULF OIL CORPORATION,
Appellant,

v.

GOVERNOR OF THE STATE OF MARYLAND, et al.,
Appellees.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Gulf Oil Corporation, appellant, appeals from a judgment of the highest court of the State of Maryland upholding the constitutionality of a Maryland statute against challenges based upon the federal constitution. Gulf urges plenary consideration of the questions presented, with briefs and oral argument.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland sought to be reversed by this appeal is reported at 279 Md. 410, 370 A.2d 1102 (1977). The supplemental opinion on motions for reconsideration is reported at

279 Md. 456, 372 A.2d 237 (1977). The trial court filed two opinions which have not been officially reported. Copies of all four opinions are printed in the Joint Appendix to Jurisdictional Statements being separately filed on behalf of several appellants.

JURISDICTION

The opinion of the Court of Appeals of Maryland upholding the statute at issue was filed on February 18, 1977. Motions for reconsideration and stay of mandate were timely filed, and on April 13, 1977, were denied. On June 27, 1977, notices of appeal were filed with the clerk of the Court of Appeals of Maryland and the clerk of the Circuit Court for Anne Arundel County which is possessed of the record. A. 147a-150.

This Court has jurisdiction by virtue of 28 U.S.C. §1257(2). *Reconstruction Finance Corp. v. Beaver County,* 328 U.S. 704 (1946); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *Western Turf Ass'n v. Greenberg,* 204 U.S. 359 (1907).

STATUTES INVOLVED

The statute at issue (hereinafter "the Act" or "the Maryland Act") is Chapter 854, Laws of Maryland 1974, as amended by Chapter 608, Laws of Maryland 1975, codified in Volume 5B of the Annotated Code of Maryland (1957), Art. 56, §157E (1972 Repl. Vol. 1976 Cum. Supp., pp. 42-43), which states in pertinent part:

> "(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

> (C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.
>
> (D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

QUESTIONS PRESENTED

By prohibiting producers and refiners of petroleum products from owning and operating retail service stations in Maryland, do Paragraphs (B) and (C) of the Act violate the Commerce Clause?

By requiring producers, refiners and wholesalers of petroleum products to extend all voluntary allowances uniformly to all their Maryland dealers, does Paragraph (D) of the Act violate the Commerce Clause?

By requiring producers, refiners and wholesalers of petroleum products to extend all voluntary allowances uniformly to all their Maryland dealers, does Paragraph (D) of the Act conflict with the Robinson-Patman Act?

STATEMENT OF THE CASE

The Federal Questions Are Properly Raised

The questions presented were raised in paragraph 10 of Gulf's bill of complaint which, *inter alia,* alleged:

> "g. The Act discriminates against and unduly burdens interstate commerce and is invalid under the Commerce Clause of Article I, §8 of the United States Constitution. . . .

> j. Paragraph (D) of the Act conflicts with 15 U.S.C. §13 (the Robinson-Patman Act) and is therefore invalid under the Supremacy Clause of Article VI of the United States Constitution."

The trial court granted motions for partial summary judgment by Gulf and others that Paragraph (D) conflicted with §2(b) of the Robinson-Patman Act, 15 U.S.C. §13(b), and was preempted by federal law. A. 49a-51a. Accordingly, the issues at trial were limited to other provisions of the Act, including Paragraphs (B) and (C). The trial court held Paragraphs (B) and (C) unconstitutional for a variety of reasons, but rejected the contention that they violated the Commerce Clause. A. 53a-134a.

The Court of Appeals of Maryland reversed, expressly holding Paragraphs (B) and (C) "are not unconstitutional under the Commerce Clause" and Paragraph (D) does not conflict with the Robinson-Patman Act. A .24a, 41a.

Although the contention that Paragraph (D) violates the Commerce Clause plainly was raised in Gulf's bill of complaint, the trial court did not decide this issue apparently because it granted partial summary judgment based upon the Robinson-Patman Act. Accordingly, on appeal, Gulf did not pursue and the Court of Appeals, pursuant to Maryland procedure, did not decide it.[1] However, having been properly raised, the issue whether Paragraph (D) violates the Commerce Clause is preserved for review in this Court.

[1] Maryland Rule of Procedure 885 states in part: "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried *and decided* by the circuit court . . .". (Emphasis added.) *Rippon v. Mercantile-Safe Deposit & Trust Co.*, 213 Md. 215, 222, 131 A.2d 695, 698 (1957).

Facts Material to the Commerce Clause Issue — Paragraphs (B) and (C)

Petroleum products are not produced or refined in the State of Maryland. All of the gasoline sold by Gulf and others in Maryland is imported from outside the state. A. 19a.

At the time of trial there were 209 service stations in Maryland operated by producers or refiners. E.[2] 397. All of these company operations are prohibited by Paragraphs (B) and (C) of the Act. "The station must be operated by a retail service station dealer." Md. Annot. Code, Art. 56, §157E(b) and (c).

The impact of Paragraphs (B) and (C) upon Gulf will be that it must divest itself of ownership of its company operated station, and abandon its plan to increase company operated stations in Maryland by twenty-two stations over a five year period. E. 105, ¶16. These stations were intended to be self-service, in the belief that many consumers prefer the lower prices and greater efficiency available at such stations. E. 594, ¶9. Gulf stations in Maryland serve consumers in both interstate and intrastate commerce. E. 107-108, ¶26.

Paragraphs (B) and (C) also will prevent entry into the Maryland market of producers and refiners who have not yet entered. E. 401-402. They also will prevent businessmen who presently limit their operations to retail marketing from integrating backward into refining or producing, which is a traditional growth pattern in the petroleum industry. E. 402-403.

Facts Material to the Robinson-Patman and Commerce Clause Issues — Paragraph (D)

Gulf recognizes certain competitive trading areas in Maryland and surrounding states wherein it identifies

[2] "E." refers to the Joint Record Extract filed in the Court of Appeals of Maryland.

competitive markets for the sale of its products. Within such trading areas it has, in order to meet competition from other suppliers, granted temporary competitive allowances to its dealers or resellers without granting such allowances throughout the state. E. 108, ¶27.

Some of Gulf's trading areas cover geographic areas which cross the boundaries of the State of Maryland into adjoining jurisdictions, including the District of Columbia, Virginia, Delaware, Pennsylvania and West Virginia. E. 108, ¶28.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The decision below effectively invites states to enact varied and discordant legislation which interferes with the nationwide structure and interstate operations of the petroleum industry. This process already has commenced. A.15a; see §526.151 Fla. Stats. invalidated in *Exxon Corp. v. Conner*, Case No. 74-1449, Cir. Ct., 2d Jud. Cir., Leon County, Fla. (1975); Del. Code Anno., Tit. 6, §§2905-2906 (1976 Cum. Supp.); R.I. Gen'l Laws, Chap. 55 of Tit. 5; Cal. Bus. & Profes. Code, Chap. 8, Div. 8, invalidated in *Shell Oil Co. v. Younger*, 1976-1 CCH Trade Cases, ¶60, 960 (N.D. Cal. 1976), *appeal pending*, No. 76-2784; D.C. Law 1-123 (effec. 4/19/77); Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional And Economic Assessment*, 28 Vanderbilt Law Rev. 1277, 1279-1280 (1975).

It is vital for this Court to identify the constitutional limits of states' power to regulate the energy industry. This should be done now, when laws such as the Maryland Act are in their infancy and before the petroleum industry is required to make wide ranging, structural changes according to piecemeal state requirements.

The decision of the Court of Appeals flagrantly disregards Commerce Clause principles set forth by this Court in numerous cases. Thus, the lower court failed even to discuss whether the Act's prohibition against vertical integration so affects interstate commerce that Congress and not any individual state should control such legislation. Its opinion excuses blatant discrimination in favor of local, independent dealers against out-of-state interests, and permits wide ranging interference with the interstate market in petroleum products. Moreover, it fails even to discuss the State's failure to meet its burden of justifying the Act in terms of local benefits and the unavailability of nondiscriminatory alternatives.

As to the Robinson-Patman Act, this case presents the question expressly left open in *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 512, n. 7 (1963), namely, whether the meeting competition defense of §2(b) of the Robinson-Patman Act, 15 U.S.C. §13(b), applies to a supplier, e.g. Gulf, who offers price assistance to its dealer to enable the dealer to meet competition from another dealer receiving assistance from its supplier, e.g. Shell. If the meeting competition defense applies in these circumstances, Paragraph (D) of the Maryland Act conflicts with §2(b) of the Robinson-Patman Act, and is invalid.

The United States Court of Appeals for the Seventh Circuit, other federal courts, the Federal Trade Commission and the Department of Justice have answered this question affirmatively, i.e. the meeting competition defense does apply in these circumstances. See text *infra* at 21-23. However, the decision below answers this question negatively, i.e., the meeting competition defense does not apply in these circumstances. A. 39a-40a. Obviously, it is important to the administration of the Robinson-Patman Act for this conflict to be resolved.

I. BY PROHIBITING PRODUCERS AND REFINERS OF PETROLEUM PRODUCTS FROM OWNING AND OPERATING RETAIL SERVICE STATIONS IN MARYLAND, PARAGRAPHS (B) AND (C) OF THE ACT VIOLATE THE COMMERCE CLAUSE.

The extent to which any burden on interstate commerce will be tolerated depends upon "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." E.g., *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970); *Great Atlantic & Pacific Tea Co. v. Cottrell,* 424 U.S. 366, 372 (1976). When discrimination against commerce is demonstrated, "*the burden falls on the State* to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Comm.,* ___ U.S. ___, 45 LW 4746, 4751 (June 20, 1977). (Emphasis added.)

A. Paragraphs (B) and (C) Burden Interstate Commerce.

This Court has identified at least three ways in which a state may burden interstate commerce:

1. Discrimination against interstate commerce. E.g., *Hunt v. Washington State Apple Advertising Comm., supra; Great Atlantic & Pacific Tea Co. v. Cottrell, supra; Dean Milk Co. v. Madison,* 340 U.S. 349 (1951); *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525 (1949).

2. State regulation of interstate commerce where regulation, if any, should be national in scope. *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960); *Bibb v. Navajo Freight Lines,* 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945).

3. State interference with the natural functioning of an interstate market through prohibition or burdensome regulation. *Hughes v. Alexandria Scrap Corporation,* 426 U.S. 794, 806 (1976).

Paragraphs (B) and (C) of the Act impose burdens on interstate commerce in all of these ways.

1. *Paragraphs (B) and (C) discriminate against interstate commerce.*

Paragraphs (B) and (C), on their face, are designed to protect local markets from foreign competition by giving local, independent dealers the exclusive right to operate service stations for the retail sale of petroleum products. The Court of Appeals of Maryland recognized that protection of independent retail dealers a purpose of the Act. A. 14a.

Since oil is neither produced nor refined in Maryland, A. 19a, it is only by reason of their out-of-state producing or refining activities that Gulf and all other producers or refiners are ineligible to compete in the Maryland retail petroleum market. It is difficult to conceive a more blatant form of discrimination against interstate commerce. This discrimination, "in practical effect", *Dean Milk Co. v. Madison, supra* at 354, assumes numerous forms. First, the Act totally prohibits producers and refiners who presently are competing in the Maryland retail petroleum market from continuing or increasing their competition. Thus, Gulf, who intended to phase in twenty-two, self-service, low price gasoline stations within five years, E. 594, ¶9, is barred from doing so.

Secondly, potential entrants to the Maryland retail market are denied entry. Uncontroverted evidence reflects there are some 32 producers or refiners, described by the State's expert as highly competitive (See E. 401), who never have entered this market, E. 243, but who potentially may do so, but for the Act.

Thirdly, the Act would prevent Maryland retail operators who are not vertically integrated from strengthening their operation through "backward integration" into refining or production. This has been a traditional growth pattern in petroleum marketing. E. 402-403. Uncontradicted evidence at trial reflected that at least one retail price marketer in Maryland, Hudson Oil Company, intended to construct an out-of-state refinery. E. 499-500. Upon completion of the refinery, Hudson would be a refiner, and the Act would exclude Hudson from the retail petroleum market in Maryland solely by reason of its out-of-state activity.

It is irrelevant that if there were any Maryland producers and refiners, they would be treated in the same manner as out-of-state producers and refiners. *Dean Milk Co. v. Madison, supra* at 354, n. 4. "In . . . erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." *Id.* at 354. Maryland may not discriminate against those areas of the country which do produce or refine petroleum, because statutes "designed to neutralize advantages belonging to the place or origin . . . are . . . hostile in conception as well as burdensome in result." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *H.P. Hood & Sons v. DuMond, supra,* at 539.

In *Hunt v. Washington State Apple Advertising Comm., supra* at 4751, this Court described three discriminatory effects of a North Carolina statute which led to its invalidation: increased costs imposed upon apple producers from the State of Washington to do business in North Carolina; "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself"; "a leveling effect which insidiously operates to the advantage of local apple producers."

As in *Hunt* the Maryland Act imposes increased costs upon out-of-state producers and refiners to do business in Maryland. The 209 service stations in Maryland operated by producers or refiners, E. 397, either will have to go out of business or convert to independent dealerships. Three parties offered uncontroverted testimony that their "low price — high volume stations could not be economically run with non-company personnel, and that, in all probability, they would be forced to withdraw from the Maryland market if the Act were to become effective." A. 6a. As to those who elect to convert to independent dealerships, the probable cost is substantial. E.g., E. 115-116, ¶17; E. 244. This increased cost of doing business in Maryland, imposed solely on out-of-state interests, is discriminatory. *Hunt v. Washington State Apple Advertising Comm., supra* at 4751; *Pike v. Bruce Church, Inc., supra* at 145; *Toomer v. Witsell,* 334 U.S. 385, 403, 406 (1948).

As in *Hunt,* the Maryland Act "has the effect of stripping away" from out-of-state producers and refiners "the competitive and economic advantages [they have] earned for [themselves]". Thus, producers or refiners who have employed such innovative techniques through company operations as low price, self-service stations (see E. 594, ¶9), Gulf's "Tire Hut" discount auto, home and garden centers (E. 594-595, ¶12), Shell's self-repair stations (E. 614-615, ¶16) and Exxon's Car Care Centers (E. 358) will lose "the competitive and economic advantages" generated through these innovations.

Lastly, as in *Hunt,* the Maryland Act operates to the advantage of local, independent dealers. This effect is not merely "insidious" as in *Hunt.* On the contrary, it is openly and blatantly protective of the local interests: "The station must be operated by a retail service station dealer." Md. Annot. Code, Art. 56, §157E(b) and (c).

In *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 375 (1964), this Court invalidated "as a burden on interstate commerce . . . part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market." *A fortiori* this Court should invalidate the Maryland regulatory scheme which reserves to its local, independent dealers virtually all of the Maryland retail petroleum market.

2. *Paragraphs (B) and (C) Regulate Interstate Commerce Where Regulation, If Any, Should Be National In Scope.*

"[A] state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." *Huron Portland Cement Co. v. Detroit, supra* at 444. "[E]ver since Gibbons v. Ogden, 9 Wheat. (US) 1, . . . the states have not been deemed to have authority . . . to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona, supra* at 767.

In *Southern Pacific* the state of Arizona attempted to regulate the length of interstate trains passing through the state. *Id.* at 763. In rejecting such regulation on Commerce Clause grounds, this Court stated:

> "such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule." Id. at 781.

To like effect is *Robbins v. Taxing District of Shelby County,* 120 U.S. 489, 498-499 (1887). See *Welton v. Missouri,* 91 U.S. 275 (1876).

It is beyond question that the petroleum industry is national and international in scope. It also is beyond question that the ownership and operation of service

stations at the retail level is a significant part of the present structure and planning of the various producers and refiners of petroleum products. For example, Gulf's plans call for company ownership and operation of approximately 10% of its stations both nationwide and in Maryland. E. 114, ¶13. Three of the oil companies in this action operate in Maryland exclusively through company operated stations. A. 23a. Ashland Oil, Inc., nationally, owns and operates more than 50% of its stations. E. 146, ¶11. Kayo Oil Company, a wholly-owned subsidiary of Continental Oil Company, E. 93, ¶9, owns and operates 100% of its stations nationwide. E. 382.

Any restructuring of the petroleum industry clearly is a matter of national concern. As the Court of Appeals noted: "Divestiture of retail gasoline stations by producers and refiners as a means of preserving competition in retail gasoline marketing recently has been recommended by at least two Congressional committees. See H. R. Rep. No. 94-1762, 94th Cong., 2d Sess. (1976); S. Rep. No. 94-1005, 94th Cong., 2d Sess. (1976)." A. 15a. In *Federal Trade Commission v. Sun Oil Company, supra* at 528, this Court, commenting on the advisability of vertical integration, stated: "[S]uch a broad determination of economic policy . . . is not for us to make here."

In short, the issue of whether vertical integration should be permitted, regulated, or prohibited is a matter of such far reaching impact that Congress, and not any individual state, should resolve it. If, as in *Bibb v. Navajo Freight Lines, supra* at 529, Illinois' attempted regulation of mudguards on interstate trucks violated the Commerce Clause and was held "not one of those matters 'admitting of diversity of treatment, according to the special requirements of local conditions,'" *a fortiori* Maryland's purported restructuring of the

petroleum industry is not a matter admitting of diversity of treatment.

3. *Paragraphs (B) and (C) Interfere With the Natural Functioning of an Interstate Market.*

In *Hughes v. Alexandria Scrap Corporation, supra* at 806, this Court, following a review of various statutes held to violate the Commerce Clause, stated: "The common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." Paragraphs (B) and (C) interfere with the natural functioning of the interstate petroleum market in numerous respects.

First, the forms of discrimination against interstate commerce discussed earlier also are interferences with the natural functioning of the interstate market. Thus, distortions in the natural functioning of the interstate petroleum market are generated by the exclusion of producers and refiners already competing in the Maryland retail market and retail marketers who integrate backward. Interference also is generated by excluding potential competitors. E.g., E. 401-402, E. 438-440. For example, this Court has recognized that a proposed merger should be prohibited if it will prevent one of the participants to the merger from entering a particular market on its own, because merely keeping such a potential competitor waiting in the wings can have a positive effect on competition. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-533 (1973); *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964). The fact that most producers or refiners primarily operate through independent dealers and not company owned stations does not negate the fact that their potential as competitors has a significant impact on the interstate market for petroleum products. E. 438-440, E. 401-402; see *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 237-238 (1951).

Moreover, there are 209 retail service stations in Maryland operated by producers or refiners. E. 397. Paragraphs (B) and (C) require these operations to cease. Although some locations may be taken over by independent dealers, it appears probable that other locations' uses will be changed. In such event the interstate flow of petroleum to Maryland will be reduced or at least interfered with.

The Act also would interfere with the wholesale market in petroleum products. For example, Ashland Oil, Inc., a refiner of petroleum products, operates in the Maryland wholesale and retail petroleum market. E. 493-494, E. 577. The Act would require Ashland to abandon its retail outlets, which are company operated. Uncontradicted testimony offered by Ashland was that loss of its retail outlets in Maryland would make it extremely difficult to maintain its wholesale operation and the likely result would be diversion of its activities into other states. E. 493-494. Obviously, this would interfere with the natural functioning of the interstate petroleum products market.

In *Pike v. Bruce Church, Inc., supra,* this Court invalidated an Arizona statute which would have required a grower of cantaloupes to expend approximately $200,000.00 in order to construct a facility for the sorting, inspection and packing of its cantaloupes when such functions were already being performed at its nearby California location. *Id.* at 144. The Court noted that although the challenged legislation did not impose "rigidity on an entire industry", it did "impose just such a straitjacket on the appellee company," and therefore the legislation was invalid. *Id.* at 146. If imposing rigidity upon only one company was

sufficient to invalidate legislation on Commerce Clause grounds, *a fortiori* the industry wide rigidity imposed under the Maryland Act is sufficient. Although the Court of Appeals stated only a "wholly intrastate activity was being regulated, A. 18a, "[i]f it is interstate commerce which feels the pinch, it does not matter how local the operation which supplies the squeeze." E.g., *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

B. Any Local Interests Involved May Be Promoted Through Alternatives With Far Less Impact Upon Interstate Commerce Than Paragraphs (B) And (C).

As previously noted, the extent to which a burden on interstate commerce will be tolerated will "depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc., supra* at 142; *Great Atlantic & Pacific Tea Co. v. Cottrell, supra* at 372. Given the discrimination against and other burdens upon interstate commerce discussed earlier, "the burden falls on the State to justify it in terms of the local benefits . . . and the unavailability of nondiscriminatory alternatives . . .". *Hunt v. Washington State Apple Advertising Comm., supra* at 4751.

The Court of Appeals identified two local interests which Paragraphs (B) and (C) were designed to protect: (1) preventing producers and refiners from favoring their company owned stations over independent dealers with respect to the allocation of gasoline during shortages, and (2) preventing the monopolistic control of gasoline marketing by a few large refiners and producers. A. 14a-15a.

As to the first concern, i.e., fair allocation, Section 4(a) of the Emergency Petroleum Allocation Act of 1973 and regulations promulgated thereunder already provide a scheme for the mandatory allocation and pricing of petroleum products. 15 U.S.C. §§751-756; 10 C.F.R. §§210-213. Moreover, Paragraph (F) of the Act mandates fair allocation. Md. Annot. Code, Art. 56, §157E(f). One guilty of non-compliance is criminally liable. Md. Annot. Code, Art. 56, §§157(F)(g) and 157(K). Therefore, this concern fully is met without the drastic remedy of divestiture.

In light of the record below, one must be skeptical as to whether the second concern, i.e. monopolization, is significant at the local level. Even the State, in its brief to the Court of Appeals, conceded that "the retail marketing of petroleum products in the State of Maryland is a highly competitive industry." State's Brief to Ct. of App. at 7. Any concern about monopolization is strenuously inconsistent with such a concession. However, assuming *arguendo* the validity of this concern, it can be satisfied through less burdensome means than divestiture.

First, any attempt at monopolization can be challenged by active enforcement of the federal antitrust laws, including the use of the new *parens patriae* action, 15 U.S.C. §§15C-15H, and Maryland's antitrust law, Md. Annot. Code, CL §§11-201, *et seq.* Further, inasmuch as the reach of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, is even greater than that of other antitrust laws, Maryland, like Connecticut, could enact legislation allowing government officials and private citizens to initiate legal action against activities which have been found to violate §5 of the Federal Trade Commission Act. See §42.110a *et seq.* of the Conn. Genl. Stats. Annot.

Moreover, Maryland already protects the non-company owned gasoline retailer by virtue of its Gasoline Products Marketing Act. Md. Annot. Code, CL §11-30, *et seq.* Finally, even if Maryland determines

that existing laws may not reach the types of incipit predatory activities which lead to monopolization, it could enact legislation directly related to such activities. As an example, if predatory pricing is the evil, Maryland may prohibit below cost sales. Obviously, these and similar alternatives are far less drastic than excising an entire segment of an out-of-state industry from the Maryland retail petroleum market.

Most importantly, the State has failed to sustain its burden to justify the Act by demonstrating any probability that it will produce the desired results, namely, "to preserve competition within the retail gasoline marketing industry in Maryland." A. 19a; see *Hunt v. Washington State Apple Advertising Comm.*, *supra* at 4751. Even the Court of Appeals recognized "there has been no evidence by which to judge the effects of [divestiture] statutes and predictions as to the effects of the Act are at best speculative." A. 15a-16a.

II. BY REQUIRING PRODUCERS, REFINERS AND WHOLESALERS OF PETROLEUM PRODUCTS TO EXTEND ALL VOLUNTARY ALLOWANCES UNIFORMLY TO ALL THEIR MARYLAND DEALERS, PARAGRAPH (D) VIOLATES THE COMMERCE CLAUSE.

A. Paragraph (D) Burdens Interstate Commerce.

A state has no power to regulate commerce beyond its borders. *Baldwin v. G.A.F. Seelig, Inc., supra* at 521; *Southern Pacific Company v. Arizona, supra* at 775. By effectively regulating commerce beyond Maryland's borders, Paragraph (D) transcends the limits of state authority. The manner in which Paragraph (D) accomplishes this can be described by example.

If Gulf were to decide to extend a voluntary allowance to a service station in the District of Columbia (see E. 108, ¶¶27-28), the Robinson-Patman Act, 15 U.S.C. §13(a), would require Gulf to extend the allowance to

competing service stations in Prince George's County, Maryland. *Federal Trade Commission v. Sun Oil Company, supra* at 519-520. However, if the voluntary allowance were extended to even one Prince George's County service station, Paragraph (D) of the Maryland Act would require the allowance to be extended to every other Gulf dealer in Maryland.

Obviously, such a requirement will greatly inhibit, if not totally eliminate, the likelihood of Gulf's extending any voluntary allowance to its service station in the District of Columbia. By thus tampering with Gulf's economic activities outside Maryland, the Act effectively regulates commerce outside Maryland, thereby interfering with the natural functioning of the interstate market and violating the Commerce Clause.[3] See text *supra* at 14-16.

Moreover, any legislation affecting economic activity in the jurisdictions bordering Maryland should be enacted through Congress and not an individual state. *Huron Portland Cement Co. v. Detroit, supra* at 444; *Bibb v. Navajo Freight Lines, supra* at 529-530; and *Southern Pacific Company v. Arizona, supra* at 770-771. Uniformity of regulation is required. See text *supra* at 12-14.

B. Any Local Interests Involved May Be Promoted Through Alternatives With Far Less Impact Upon Interstate Commerce Than Paragraph (D).

The perceived local interest being served by Paragraph (D) is "to prevent the practice of localized price discounts". A. 35a. Assuming *arguendo* this is a legitimate local interest, there are adequate, less burdensome alternatives, such as active prosecution of

[3] This example would apply as well to Delaware, Pennsylvania, Virginia and West Virginia, all of which border Maryland.

the Robinson-Patman Act, 15 U.S.C. §13, and Maryland's own version of the Robinson-Patman Act, Md. Annot. Code, CL §11-204. Alternatively, Maryland may prescribe a reasonable geographic area, instead of the arbitrary statewide requirement found in Paragraph (D). Such alternatives would meet the apparent concern of Paragraph (D) without the extraterritorial dislocations which it generates in its present form. The existence of such alternatives plainly reflects the State's failure to meet *its* burden to justify Paragraph (D) in terms of the local benefits and unavailability of less burdensome alternatives. Therefore, it should be invalidated under the Commerce Clause. *Hunt v. Washington State Apple Advertising Comm.*, *supra* at 4751-4752; *Pike v. Bruce Church, Inc.*, *supra* at 142.

III. BY REQUIRING PRODUCERS, REFINERS AND WHOLESALERS OF PETROLEUM PRODUCTS TO EXTEND ALL VOLUNTARY ALLOWANCES UNIFORMLY TO ALL THEIR DEALERS, PARAGRAPH (D) OF THE ACT MARYLAND DEALERS, PARAGRAPH (D) OF THE ACT CONFLICTS WITH THE ROBINSON-PATMAN ACT.

As construed by the Court of Appeals, "voluntary allowances" means "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a *competing* retail dealer." A. 35a. (Emphasis added.) Paragraph (D) of the Maryland Act requires that if Gulf extends voluntary allowances to one or more dealers to meet competition, Gulf must extend such allowances to all dealers supplied in Maryland. Extending voluntary allowances less than statewide is prohibited. Therefore, if under the Robinson-Patman Act, less than statewide voluntary allowances are permitted, there is a conflict with Paragraph (D).

A. The Decision Below Conflicts With Substantial Federal Authority As To The Scope Of §2(b) Of The Robinson-Patman Act.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), provides in part that "[i]t shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition." Section 2(b), 15 U.S.C. §13(b), however, provides an absolute defense to an alleged §2(a) violation through a showing that any price discrimination was "made in good faith to meet an equally low price of a competitor." *Standard Oil Co. v. Federal Trade Commission*, *supra* at 251.

The question has arisen, however, as to whose competitor's (the supplier's or the dealer's) "equally low price" may be met. For example, may Gulf lower the price to its dealer to assist him in meeting competition from an Exxon dealer whom Exxon is assisting? Or may Gulf lower its price only to prevent a "price raid" by Exxon upon the Gulf dealer when Exxon is offering the Gulf dealer a lower price to switch to Exxon?

This question is relevant here because according to the Court of Appeals, the first situtation involves a "voluntary allowance"; Paragraph (D) therefore applies; but §2(b) does not. A. 39a-40a. However, the second situation does not involve a "voluntary allowance;" Paragraph (D) therefore does not apply; but §2(b) does. A. 39a-40a. Therefore, reasons the Court of Appeals, Paragraph (D) and §2(b) do not conflict.

In *Federal Trade Commission v. Sun Oil Co.*, *supra* at 512, n.7, this Court expressly left open the issue presented here, i.e., whether a supplier of petroleum products, e.g. Gulf, was meeting its own competition when it lowered its price to its dealer in order to permit

that dealer to compete (i) with another dealer, e.g. an Exxon dealer across the street, who may have received an enabling price reduction from Exxon, or (ii) with a station operated by an integrated company such as Exxon.

Following *Sun Oil*, the Federal Trade Commission expressed its opinion on this issue:

> "[A] price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer." *Federal Trade Commission Report On Anti-Competitive Practices In The Marketing Of Gasoline,* 3 CCH Trade Reg. Rep. ¶10,373 at p. 18, 245 (1967) (hereinafter referred to as "1967 Report").

In 1972, the Seventh Circuit was faced with the question left unresolved by *Sun Oil. Bargain Car Wash Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972). In an opinion by Mr. Justice Clark, sitting by designation, in which Mr. Justice Stevens, then a circuit judge, concurred, the court stated:

> "In Sun Oil Company v. FTC, 371 U.S. 505 (1963) the competitor of Sun's dealer had not received any support or allowance from its supplier to enable it to sell at reduced prices. The Court held that Section 2(b) did not afford Sun any protection. However, it specifically reserved decision where an allowance from Sun's competitor supplier was present. The Court had not had occasion to pass upon the question. Unfortunately, it faces us and effective administration requires that we answer it. We are inclined to the view that the Section 2(b) defense is available to American if the lower price granted its individual dealer is made to meet an equally low price made by a competitor of American to an individual competitor of American's dealer." *Id.* at 1175.

Accord, Bunty v. Shell Oil Co., 1972 Trade Cases ¶74,252 at p. 93,189 (D. Nev. 1972); *United States Department of Justice Report On The Robinson-Patman Act* at 93-97 (1977); see *Belliston v. Texaco, Inc.*, 455 F.2d 175, 182 (10th Cir. 1972), *cert. den.*, 408 U.S. 928 (1972); *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 997-998 (10th Cir. 1965), *cert. den.*, 380 U.S. 964 (1965); *Gray v. Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. den.*, 412 U.S. 943 (1973).

Contrary to the 1967 Report, Bargain Car Wash and other cases cited above, and the Department of Justice report, the Court of Appeals of Maryland concluded that the meeting competition defense is available only where the price reduction "is to meet the equally low price offered to *the same buyer* by a competing seller." A. 39a-40a. (Emphasis in original.) This defense does not extend to "temporary price reductions . . . given to a dealer to meet the lower price of a competing dealer". A. 40a.

Although recognizing "the question is not without doubt," A. 37a, the court perceived "a conflict in the lower federal courts on this question" and relied upon *Enterprise Industries Inc. v. Texas Company*, 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. den.*, 353 U.S. 965 (1957), as the primary authority for its conclusion. A. 37a.

B. Paragraph (D) Conflicts With §2(b) Of The Robinson-Patman Act.

As stated earlier Paragraph (D) of the Act prohibits producers, refiners and wholesalers from granting "voluntary allowances" less than statewide. Such prohibition directly conflicts with their §2(b) right to grant less than statewide voluntary allowances to meet competition, as that right is construed in the 1967 Report, Department of Justice report, *Bargain Car Wash* and other federal cases. This conflict is fatal to Paragraph (D) under the Supremacy Clause.

Moreover, this Court has recognized a tension between the Sherman Act, on one side, and the Robinson-Patman Act (amending the Clayton Act), on the other. *Standard Oil Company v. Federal Trade Commission*, *supra* at 248-249. Basically, the Sherman and Clayton Acts promote price flexibility, while the Robinson-Patman Act in part promotes price conformity. The §2(b) "meeting competition" defense is at the very heart of Congress' attempt to reconcile the conflict. *Id.* at 249-250. "Were it not for this provision, the Robinson-Patman Act would have thwarted the Sherman Act objective of fostering price competition and price flexibility." *Antitrust Law Developments*, p. 143 (ABA 1975).

Notwithstanding this delicate balancing process, Maryland purports to eliminate the meeting competition defense by prohibiting less than statewide voluntary allowances, thereby removing the linchpin of the federal scheme. By upsetting this delicate balance, Paragraph (D) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

CONCLUSION

By reason of the foregoing, the federal questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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